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No.

IN THE

Supreme Court of the United States

October Term, 1981

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

and

THE UNITED CONTRACTORS ASSOCIATION,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did not the courts below err in ruling that a contractor trade association, which negotiated with an operating engineers union an agreement containing a racially-neutral hiring-hall provision but which itself never hired operating engineers, is nonetheless vicariously liable for the union's discrimination in the operation of the hiring hall, in breach of the agreement and in violation of 42 U. S. C. § 1981, where the association had no contact with the hiring hall after the negotiations and neither knew nor had reason to know of the union's discrimination?

II. Did not the courts below err in making a contractor trade association subject to a far-reaching mandatory injunction to remedy the union's discrimination and also in imposing on that association a substantial financial obligation in connection with that injunction?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were:

1. Raymond Williams
   Willie McKay
   Marion J. Eaddy
   Randolph Hughes, Jr.
   Arel Brownlee
   William Bostic
   Kenneth Howard
   Alpha Christmas
   Ronald Richardson
   Clarence Winder
   Ronald Crawford
   Frank Gilchrist

who were plaintiffs below, respondents in this Court, and class representatives of more than 1,000 persons;

2. The Commonwealth of Pennsylvania which was a plaintiff below and a respondent in this Court;

3. Local 542, International Union of Operating Engineers which was a defendant below but not a petitioner to this Court;

4. Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware which was a defendant below but not a petitioner to this Court;

5. General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, and United Contractors Association which were defendants below and separate petitioners to this Court;

6. Glasgow, Inc. which was a defendant below, separate petitioners to this Court, and class representative of approximately 1,400 contractors; and

7. Bechtel Power Corporation and United Engineers & Constructors, Inc. which were class members but not parties below and separate petitioners to this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES IN THE COURT OF APPEALS	ii
TABLE OF AUTHORITIES	iv
OPINIONS IN THE COURTS BELOW	2
JURISDICTION OF THIS COURT	2
THE STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	6
I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on all Those Industries Throughout the United States Which Utilize Hiring Halls	6
II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals, As Well As Applicable Decisions of This Court	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Allen v. Pipefitters Local Union No. 208, 56 F. R. D. 473 (D. Colo. 1972) 12

Chicano Police Officer's Ass'n. v. Stover, 552 F. 2d 918 (10th Cir. 1977) 10, 11

City Bank v. Rivera Davila, 438 F. 2d 1367 (1st Cir. 1971) 13

City of Memphis v. Greene, 49 U. S. L. W. 4389 (U. S. 1981) 8

City of Milwaukee v. Saxbe, 546 F. 2d 693 (7th Cir. 1976) 10

County of Los Angeles v. Davis, 440 U. S. 625 (1979) 8

Craig v. County of Los Angeles, 626 F. 2d 659 (9th Cir. 1980) 11

Des Vergnes v. Seekonk Water Dist., 601 F. 2d 9 (1st Cir. 1979) 10

Detroit Police Officers Ass'n. v. Young, 608 F. 2d 671 (6th Cir. 1979) 10

Donnell v. General Motors Corp., 576 F. 2d 1291 (8th Cir. 1978) 10

Grigsby v. North Mississippi Medical Center, Inc., 586 F. 2d 457 (5th Cir. 1978) 10

Guardians Ass'n. v. Civil Service Comm'n., 633 F. 2d 232 (2d Cir. 1980) 10, 11

Houston Chapter, Associated General Contractors, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965); *cert. denied*, 382 U. S. 1026 (1966) 6

International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977) 8

Johnson v. Alexander, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978) 10

Local 357, International Brotherhood of Teamsters v. NLRB, 365 U. S. 667 (1961) 6

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Lummus Co. v. NLRB, 339 F. 2d 728 (D. C. Cir. 1964) 11
McFadden v. Baltimore Steamship Trade Association, 8 BNA FEP Cases 391 (D. Md. 1972) 12
Milliken v. Bradley, 418 U. S. 717 (1974) 12
Monell v. Department of Social Services of the City of New York, 436 U. S. 658 (1978) 8, 9
Morrison-Knudsen Co., Inc. v. NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) 11
NLRB v. Master Stevedores Association, 418 F. 2d 140 (5th Cir. 1969) 11
Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981) 9
Rios v. Enterprise Ass'n. Steamfitters, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd. sub nom.* EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) 13
Swan v. Charlotte-Mecklenburg Board of Educ., 402 U. S. 1 (1971) 12
Vogler v. McCarty, Inc., 294 F. Supp. 368 (E. D. La. 1968), *aff'd sub nom.*, Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. (1969) .. 12
Washington v. Davis, 426 U. S. 229 (1976) 8, 10, 11

Statutes:

Civil Rights Act of 1964, Title VII 8
28 U. S. C. § 1254(1) 2
42 U. S. C.:
§ 1981 .....*passim*
§ 1983 ..... 8, 9

Authorities:

Restatement (2d) of Agency, § 214 ..... 9, 10

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and RAYMOND WILLIAMS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Contractors Association of Eastern Pennsylvania ("CAEP") and the United Contractors Association ("UCA") petition this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit for which review is sought is reported officially at 648 F. 2d 923. That decision affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania, the opinion for which is officially reported at 469 F. Supp. 329.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on May 19, 1981.

This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Third Circuit sitting *en banc* which decision affirmed by an *equally-divided* vote a decision by the United States District Court for the Eastern District of Pennsylvania (JA. 8; 9-212). These decisions, which were rendered under 42 U. S. C. § 1981, were that several contractor trade associations, which themselves had never hired any operating engineers, were vicariously liable to a plaintiff class of more than 1,000 minority persons seeking work as operating engineers. The basis for the decisions was that the associations negotiated an agreement with Local 542 of the International Union Operating Engineers ("Local 542") containing a racially-neutral hiring-hall provision which when implemented was operated in a racially-discriminatory fashion by Local 542 in breach of the agreement.[1] (JA. 30).

CAEP and UCA are two of the contractor trade associations which were found to be vicariously liable. CAEP is a non-profit corporation whose membership includes approximately eighty of the 1,400 employers encompassed within the defendant employer class. One of the specific purposes of the CAEP is to negotiate collective bargaining agreements with various construction unions on behalf of its membership. UCA at all times pertinent hereto was a loose-knit, unincorporated contractor association whose membership included approximately twenty-five of the above-described 1400 employers.[2] The UCA assigned the

1. The Third Circuit also affirmed by *unanimous* vote holdings of liability for racial discrimination under Title VII of the Civil Rights Act of 1964 and 42 U. S. C. § 1981 against Local 542 and its apprenticeship program, which holdings this Court will not be requested to review.

2. A good portion of the members of the loosely knit UCA were also members of the more formalized CAEP.

bargaining rights of its members to the CAEP[3] (JA. 29-30).

In 1961, Local 542 set out to impose on all contractors working within its geographic jurisdiction (eastern half of Pennsylvania and Delaware) an exclusive hiring-hall referral system wherein all employer requests for operating engineers would have to be processed through the Local 542's hiring hall. The CAEP and UCA initially resisted Local 542's lawful negotiating demand. However, after a destructive ten-week strike by Local 542 against the members of the CAEP and UCA, an exclusive hiring-hall provision was agreed to which is racially neutral on its face (JA. 23, 30).

The major thrust of this case was not that compliance with the hiring-hall provision caused discrimination since the provision was neutral on its face, but rather that Local 542 *intentionally circumvented* the hiring-hall language and effected racially discriminatory job referrals (JA. 120). Although the courts below found that Local 542 had violated § 1981 by its *failure to comply* with the racially-neutral hiring-hall referral provision, they found that the plaintiffs had *failed to prove* by a preponderance of the evidence that CAEP or the UCA either engaged in Local 542's intentional discrimination or even was or should have been aware of it (JA. 168, 195, 198). Notwithstanding the foregoing, the courts below held the CAEP and UCA vicariously liable:

> *Nevertheless, I find that* the . . . *associations [including Petitioners]* are injunctively liable to the Plaintiff class under § 1981 *as a result of their contractual relationship to and use of* a hiring hall system which

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3. Unlike the CAEP, the UCA has never had any staff employee.

> in practice effectuated intentional discrimination, *whether or not* the . . . *associations knew or should have known* (JA. 168).
> (Emphasis supplied.)

Since CAEP and UCA never employed an operating engineer, neither has ever used the Local 542 hiring hall system. In fact, since negotiation of the original provision, the CAEP and UCA have not had any contact with the hiring hall. Moreover, CAEP and UCA never have had any contractual relationship with Local 542. They, on behalf of their members, simply negotiated racially-neutral collective bargaining agreements with Local 542.

The injunction issued against CAEP and UCA is a far-reaching mandatory injunction, the terms of which are to be in existence for a five-year period. In addition, CAEP and UCA are obliged to pay ten percent (10%) each of all monetary expenses incurred as a result of the ongoing injunctive relief. Although the first year of the injunction is not yet complete, the defendants have already been required by the district court to expend approximately $190,000 under the injunction.

REASONS FOR ALLOWANCE OF THE WRIT

I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on All Those Industries Throughout the United States Which Utilize Hiring Halls.

Hiring halls are used in many industries throughout the United States. For example, they are common in the sprawling maritime industry, as well as being widely used in the giant construction industry. This Court has recognized the practical necessities and potential benefits to employers and employees alike in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667 (1961). In that case, this Court ruled that a hiring-hall provision which is facially neutral is a lawful contract provision.

With the question of the legality of hiring-hall provisions thus settled, the national labor policy then developed to a point where an employer or its bargaining representative, such as the CAEP, which is faced with a collective bargaining demand for a hiring-hall provision is under substantial pressure to accede to that demand, especially after the ruling which confirmed that exclusive hiring halls are *not only lawful* but are *mandatory* subjects of collective bargaining.[4] Therefore, a union may bargain a demand for an exclusive hiring hall to impasse and strike therefor if it wishes to bring into operation the full pressure of its economic force.

The decisions by the courts below which are the subject of this petition plainly clash with this established national labor policy by discouraging any employer or its

4. *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966).

bargaining representative from agreeing to use a hiring hall. By imposing, as the courts below did, what amounts to *strict liability* on the CAEP and UCA which did not know or have reason to know of Local 542's discrimination, and which became essentially a non-participatory third party after negotiating the original and lawful agreement, they give a strong inducement to any employer or its bargaining representative faced with a demand for a hiring hall to avoid it almost at any cost. The principal alternative would be exposure to a risk of staggering and unknown financial liability. Thus, the unavoidable result of the decisions by the courts below is inconsistency, if not outright conflict, in major national labor policies, as well as uncertainty, conflict, and even labor strife in those industries which over the years have utilized hiring halls. This Court, therefore, should take jurisdiction of and review this case with a purpose of rectifying the departure by the courts below from settled federal principles which have a profound impact on such a substantial portion of the public.

In addition, the decisions by the courts below obviously raise important questions under a federal statute in which this Court has shown great interest, 42 U. S. C. § 1981. Since the decisions at bar clearly recognize that CAEP and UCA neither knew nor had reason to know of Local 542's discrimination, and in fact had *no contact* whatever with the hiring hall after negotiation of the racially-neutral agreement, it follows inexorably that CAEP or UCA could not have had any discriminatory motive or intent. Therefore, it is fair and indeed accurate to conclude that liability under § 1981 was imposed on CAEP and UCA without proof that they intended to discriminate. In fact, the courts below ruled that § 1981 does not require such proof.

The question of whether § 1981 requires proof of discriminatory intent—in contra-distinction to Title VII of the Civil Rights Act of 1964[5]—has twice before been before this Court in *City of Memphis v. Greene*, 49 U. S. L. W. 4389 (U. S. 1981) and *County of Los Angeles v. Davis*, 440 U. S. 625 (1979). However, those cases were disposed of on other grounds. In no case has this precise issue been dealt with on the merits by this Court.

Furthermore, and as will be demonstrated in more detail below, the rulings by the courts below that § 1981 does not require proof of discriminatory intent are in direct conflict with decisions of six other circuits, as well as being in conflict with the principles established by this Court in *Washington v. Davis*, 426 U. S. 229 (1976).

Further to the construction of § 1981—and disregarding for the moment the question of discriminatory intent—the case at bar raises the very important threshold question of whether there can be *any* vicarious liability *at all* under § 1981 and if so under what circumstances. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains ". . . a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well will not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic

5. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977).

purpose of § 1981, which is, as set forth heretofore, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

In addition to the factors pointed out above, the courts below invoked the doctrine of *respondeat superior* and imposed vicarious liability on CAEP and UCA even though it was quite clear that they never hired an operating engineer and they neither controlled nor had the right to control the operation of the Local 542 hiring hall. In fact, the courts below never set forth any analysis as to why they were holding CAEP and UCA liable. As a reserve theory for imposing vicarious liability, the courts below looked to the elusive principle of non-delegable duty, which is articulated in Restatement (2d) of Agency, § 214, and then read this into § 1981. Even if the limits of § 1981 are not sufficiently circumscribed to rule out vicarious liability against the trade associations here involved, then this Court should settle the very significant question of federal law as to precisely when such liability is justified. In that regard, the plain departure by the courts below from the well-settled principles of *respondeat superior* in their construction of § 1981 clearly was erroneous and is in direct conflict with the principles of federal statutory construction set forth by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981).

II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals, as Well as Applicable Decisions of This Court.

The courts below held squarely that § 1981 does not require proof of discriminatory intent. By so doing, the Third Circuit placed itself in direct conflict with decisions in six other federal circuits and with dicta in at least two more. *City of Milwaukee v. Saxbe,* 546 F. 2d 693 (7th Cir. 1976); *Chicano Police Officer's Ass'n. v. Stover,* 552 F. 2d 918 (10th Cir. 1977); *Johnson v. Alexander,* 572 F. 2d 1219 (8th Cir.), *cert. denied,* 439 U. S. 986 (1978); *Donnell v. General Motors Corp.,* 576 F. 2d 1291 (8th Cir. 1978); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232 (2d Cir. 1980); *Grigsby v. North Mississippi Medical Center, Inc.,* 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young,* 608 F. 2d 671 (6th Cir. 1979); *Des Vergnes v. Seekonk Water Dist.,* 601 F. 2d 9 (1st Cir. 1979). In these cases, it is correctly recognized that § 1981, unlike Title VII, requires more proof than simply proof of disparate impact. Instead, they state, § 1981 requires for its violation a motive or intent to discriminate. This becomes critical in the case at bar when it is remembered that CAEP and UCA neither knew nor had any reason to know of Local 542's discriminatory referrals, let alone their having the requisite motive or intent. Therefore, this Court should now resolve this major conflict of circuits and provide the definitive construction of § 1981 which is so much needed.

In addition, the rulings of the courts below that proof of discriminatory intent is unnecessary for a violation of § 1981 are in conflict with the principles announced by this court in *Washington v. Davis,* 426 U. S. 229 (1976). Although that case sets forth the standard of proof to show a violation of the Equal Protection Clause, the mes-

sage that it bears regarding § 1981 appears clear. Although it is true that several circuits have recognized that *Washington v. Davis* strongly suggests that § 1981 requires proof of discriminatory intent,[6] as stated above it is time that this Court clearly confirms that very important rule of federal law.

Further to the conflict of circuits created by the decisions of the courts below in reaching the rather astounding decisions that they did, the courts below relied upon a line of cases under the National Labor Relations Act as amended. In this line, they relied most heavily upon *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) for the proposition that an employer who uses a union hiring hall may be liable for the union's discrimination on account of union membership without regard to whether the employer knew or should have known of the union's discrimination. Initially, *Morrison-Knudsen* in no way relates to a third-party trade association. Furthermore, although it is clear that the courts below misinterpreted *Morrison-Knudsen*,[7] that is unimportant to the instant issue of the granting of this petition because other circuits which have considered the question require knowledge as a predicate for any liability for union discrimination. *E.g.*, *NLRB v. Master Stevedores Association*, 418 F. 2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB*, 339 F. 2d 728

6. *Craig v. County of Los Angeles*, 626 F. 2d 659 (9th Cir. 1980); *Guardians Ass'n. v. Civil Service Comm'n.*, 633 F. 2d 232 (2d Cir. 1980); *Chicano Police Officer's Ass'n. v. Stover*, 552 F. 2d 918 (10th Cir. 1977).

7. As the Fifth Circuit correctly recognized, in *Morrison-Knudsen* the employer had knowledge of the union's discrimination. *NLRB v. Master Stevedores Assoc.*, 418 F. 2d 140, 142 (5th Cir. 1969).

(D. C. Cir. 1964). Therefore, when the Third Circuit ruled that it is immaterial whether CAEP or UCA knew or had reason to know of Local 542's discrimination, it drew itself into direct conflict with at least the Fifth and the District of Columbia Circuits on this important question of federal law. As with others, this conflict should now be resolved by this Court.

In addition, the decisions of the courts below appear to conflict even with the few cases which deal with employer or association liability for union discrimination on the basis of race in a hiring hall setting. *Vogler v. McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom. Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F. R. D. 473 (D. Colo. 1972); and *McFadden v. Baltimore Steamship Trade Association*, 8 BNA FEP Cases 391, 393 (D. Md. 1972). In each of these cases, the employers and associations were held *not* liable, while the courts never even inquired into the question of knowledge by the employers or associations.

Finally, it is also noted that monetary "injunctive" relief ordered against the Petitioners by the district court and affirmed by Third Circuit conflicts with well-established principles of this Court. As previously noted, there simply is no basis in equity for the district court's imposition of such an extreme monetary remedy against the Petitioners herein. As this Court has emphasized, the scope of the equitable remedy must be determined by the nature of the violation. *Swan v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1 (1971); *Milliken v. Bradley*, 418 U. S. 717 (1974). Similarly, the imposition by the courts below of a monetary "injunction" against the non-discriminating Petitioner trade associations herein is in conflict with the decisions of at least two other circuit courts.

City Bank v. Rivera Davila, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Rios v. Enterprise Ass'n Steamfitters*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom. EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977).

CONCLUSION

Since this case presents questions in respect of important matters of federal law which have a wide impact, and presents conflicts with the decisions of at least six other circuits, this Court should grant this petition, take jurisdiction of this case, and review the questions presented.

Respectfully submitted,

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